U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-G- INC.

DATE: FEB. 9, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software development consultancy, seeks to permanently employ the Beneficiary as a technical lead under the immigrant classification of member of the professions holding an advanced degree.[1] *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the record did not demonstrate the Petitioner's ability to pay the proffered wage or the Beneficiary's qualifying experience for the offered position. The Director also found the Petitioner's engagement in fraud or willful misrepresentation of a material fact. Accordingly, the Director denied the petition on May 21, 2015.

The appeal is properly filed and alleges specific errors of fact and law. The record documents the case's procedural history, which will be incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.[2]

I. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

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[1] The record indicates the Petitioner's legal change of name on February 14, 2015. Because the Petitioner has not requested amendment of the instant petition to reflect its new name, we continue to identify the company by its name at the time of the petition's filing.

[2] The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow submission of additional evidence on appeal.

The instant petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The labor certification states the proffered wage of the offered position of technical lead as $100,298 per year.

The priority date of a petition accompanied by a labor certification is generally the date the DOL accepted the labor certification application for processing. 8 C.F.R. § 204.5(d). However, an approved employment-based petition "accords the alien the priority date of the approved petition for any subsequently filed" employment-based petition on his or her behalf. 8 C.F.R. § 204.5(e). If a foreign national is the beneficiary of multiple employment-based petitions, he or she "is entitled to the earliest priority date." *Id.*

The DOL accepted the labor certification accompanying the instant petition for processing on September 26, 2013. However, the record identifies the Beneficiary as the beneficiary of a prior, approved employment-based petition with a priority date of July 11, 2009.

The Director found that the Petitioner must demonstrate its ability to pay the proffered wage of the instant petition from the earlier priority date of July 11, 2009. The record does not contain copies of the Petitioner's annual reports, federal income tax returns, or audited financial statements for 2010 or 2011.[3] The Director therefore found that the record did not demonstrate the Petitioner's continuing ability to pay the proffered wage from the instant petition's priority date.

The Petitioner argues that, pursuant to 8 C.F.R. § 204.5(d), it need only demonstrate its ability to pay from September 26, 2013, the filing date of the labor certification accompanying the instant petition. The Petitioner notes that the Director's request for evidence (RFE) of December 11, 2014 identified the instant petition's priority date as September 26, 2013, and did not request evidence of the Petitioner's ability to pay from July 11, 2009.

A. The Priority Date From Which the Petitioner Must Demonstrate Its Ability to Pay

In interpreting regulations, we must give effect to the ordinary meanings of their words and use common sense. *Matter of N-B-*, 22 I&N Dec. 590, 592 (BIA 1999) (citations omitted). We must construe the language in harmony with the wording and design of the regulations as a whole. *Id.* (citation omitted).

The regulation at 8 C.F.R. § 204.5(d) states in relevant part:

> The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor.

[3] The Petitioner submitted a copy of its federal tax return for 2009 in support of its prior petition on behalf of the Beneficiary.

The regulation at 8 C.F.R. § 204.5(e) states in relevant part:

> A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under sections 203(b)(1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under sections 203(b)(1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date. . . . A priority date is not transferable to another alien.

The two provisions appear to conflict. The regulation at 8 C.F.R. § 204.5(d) states that the priority date of an employment-based petition is the date the DOL accepted its accompanying labor certification for processing. The regulation at 8 C.F.R. § 204.5(e) appears to violate that rule by allowing a beneficiary to use the priority date of a prior, approved petition for a later filed petition.

However, the former Immigration and Naturalization Service (INS) promulgated both of the provisions at the same time in 1991 to implement the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649. *See* Final Rule for Employment-Based Immigrants, 56 Fed. Reg. 60897 (Nov. 29, 1991). INS therefore did not intend the regulations at 8 C.F.R. §§ 204.5(d) and (e) to conflict.

The plain language of both provisions indicates the attachment of priority dates to petitions. The regulation at 8 C.F.R. § 204.5(d) focuses on the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor." The regulation at 8 C.F.R. § 204.5(e) also speaks of "the priority date of the approved petition."

However, unlike 8 C.F.R. § 204.5(d), the regulation at 8 C.F.R. § 204.5(e) "accords *the alien* the priority date of the approved petition." 8 C.F.R. § 204.5(e) (emphasis added). Thus, 8 C.F.R. § 204.5(d) addresses priority dates of petitions, while 8 C.F.R. § 204.5(e) allows beneficiaries to use certain earlier priority dates. Reading the two provisions in harmony, the regulations indicate that according a foreign national the priority date of a prior approved petition does not change the later petition's priority date to that of the prior approved petition. Under 8 C.F.R. § 204.5(d), each petition has its own priority date based on the date the DOL accepted its respective labor certification application for processing. The regulation at 8 C.F.R. § 204.5(e) permits *beneficiaries* to retain earlier priority dates.

Interpreting 8 C.F.R. § 204.5(e) to change a later petition's priority date would lead to results that we believe neither Congress nor the INS intended. Because a petitioner must also establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date, *see Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), such an interpretation could limit the number of petitions filed on behalf of respective beneficiaries and deter foreign worker promotions and changes of employers.

For example, if later petitions acquired the priority dates of earlier petitions, beneficiaries of approved petitions for professionals or skilled workers could not meet the qualifications for later-filed advanced-degree petitions on their behalf if they obtained the required advanced degree or additional experience for an advanced-degree equivalency after the earlier priority date. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" to include a degree above that of a baccalaureate or a baccalaureate degree followed by five years of progressive experience in the specialty). Neither legislative nor regulatory histories indicate that Congress or the INS intended to so limit immigration opportunities of foreign workers.[4]

Even if the Director properly required the Petitioner to demonstrate its ability to pay from the earlier priority date, the Director's RFE did not afford the Petitioner an opportunity to demonstrate that ability. The RFE stated the instant petition's priority date as September 26, 2013 and did not request evidence of the Petitioner's ability to pay from 2009. *See* 8 C.F.R. § 103.2(b)(8)(iv) (requiring a request for evidence to "specify the type of evidence required" and "the bases for the proposed denial sufficient to give the . . . petitioner adequate notice and sufficient information to respond").

For the foregoing reasons, we find that the Petitioner need only demonstrate its ability to pay from the petition's priority date of September 26, 2013. We will therefore withdraw the Director's contrary finding.

B. Evidence of the Petitioner's Ability to Pay

In determining a petitioner's ability to pay the proffered wage, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner has not paid a beneficiary the full proffered wage each year, we examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and wages paid, if any. If a petitioner's net income or net current assets are insufficient to demonstrate its ability to pay the proffered wage, we may consider other evidence of a petitioner's ability to pay. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[5]

In the instant case, the Petitioner provided two copies of the Beneficiary's IRS Form W-2, Wage and Tax Statement, for 2013 and one copy of his 2014 Form W-2. None of the 2013 copies states the Petitioner's gross compensation to the Beneficiary in the appropriate boxes on the Form W-2.

[4] In the instant case, the Director required the Petitioner to demonstrate its ability to pay from the earlier priority date of July 11, 2009. However, the Director required the Petitioner to demonstrate the Beneficiary's qualifications for the offered position from the later priority date of September 26, 2013. The record does not explain the Director's inconsistent application of the priority dates.

[5] Federal courts have upheld our method of determining a petitioner's ability to pay. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

However, the forms elsewhere state the Beneficiary's gross pay as $79,758. The 2014 Form W-2 indicates the Petitioner's payment of $92,700 to the Beneficiary.

The Director discounted the 2013 Forms W-2 as evidence of the Petitioner's payments to the Beneficiary. The Director noted that the 2013 Forms W-2 state different control numbers than the 2014 Form W-2. On appeal, the Petitioner submits a July 22, 2015, letter from its CEO, attributing the different control numbers to a change of software by its payroll company.

The different control numbers on the Forms W-2 cast doubt on the Petitioner's claimed payments to the Beneficiary in 2013 and 2014. The record does not contain any documentary evidence to corroborate the CEO's explanation of the different numbers. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (finding a petitioner's unsupported assertion insufficient to meet its burden of proof in visa petition proceedings). Like the Director, we therefore will not credit the Petitioner's claimed payments to the Beneficiary in 2013 and 2014.

The record does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary. We will therefore examine the amounts of net income and net current assets reflected on the Petitioner's federal income tax returns.

Copies of the Petitioner's federal tax returns indicate annual net income amounts of $33,495 in 2013 and $46,499 in 2014. Because these amounts do not equal or exceed the annual proffered wage of $100,298, the record does not establish the Petitioner's ability to pay based on its net income amounts.

Copies of the Petitioner's federal tax returns indicate annual net current asset amounts of $125,928 in 2013 and $214,247 in 2014. These amounts exceed the annual proffered wage of $100,298. The record therefore establishes the Petitioner's ability to pay the Beneficiary's individual proffered wage in 2013 and 2014.[6] However, USCIS records indicate the Petitioner's filing of at least three Forms I-140, Immigration Petitions for Alien Workers, for other beneficiaries that remained pending beyond the instant's petition's priority date.[7]

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. *See* 8 C.F.R. § 204.5(g)(2). Therefore, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and its other beneficiaries whose petitions remained pending after the instant petition's priority date. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977) (holding that a petitioner's ability to pay is an essential element in determining

[6] The Petitioner also submitted a letter from its president as evidence of its ability to pay the proffered wage. USCIS may accept a letter from a financial officer as evidence of ability to pay if a petitioner "employs 100 or more workers." 8 C.F.R. § 204.5(g)(2). However, the Petitioner's letter states its employment of 18 workers. The record does not otherwise establish the Petitioner's employment of at least 100 workers. Therefore, the letter from the Petitioner's president does not establish the Petitioner's ability to pay.

[7] USCIS records identify the other petitions by the following receipt numbers: and The records show that the Petitioner filed one of the other petitions under a prior name.

whether a job opportunity is realistic). The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were withdrawn, denied, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not demonstrate its ability to pay multiple beneficiaries).

The evidence of record does not document the priority dates, proffered wages, or wages paid to the Petitioner's other beneficiaries. The record also does not indicate whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the record does not establish the Petitioner's continuing ability to pay the proffered wage of the instant Beneficiary and the other beneficiaries.

C. Matter of Sonegawa

As previously indicated, we may consider other evidence of a petitioner's ability to pay a proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning gross annual income amounts of about $100,000 and employing four people on a full-time basis. However, during the year of the petition's filing, she relocated her business, causing her to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend business operations. Despite the setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established her ability to pay the proffered wage. The petitioner established herself as a fashion designer whose work had been featured in national magazines. The record identified her clients as the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. The record also indicated the petitioner's frequent lectures at design and fashion shows throughout the United States and at California colleges and universities.

As in *Sonegawa*, we may consider evidence of the instant Petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years it has conducted business; the historical growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation within its industry; whether the Beneficiary will replace a current employee or outsourced service; and any other evidence of the Petitioner's ability to pay the proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since and its employment of 18 people at the time of the petition's filing in June 2014. Copies of the Petitioner's federal income tax returns indicate a general increase in revenues and wages paid from 2009 through 2013.[8]

[8] As previously indicated, the record does not include copies of the Petitioner's federal income tax returns for 2010 or 2011. However, the Petitioner 2012 return contains financial information from those years used to estimate the Petitioner's income taxes.

However, unlike in *Sonegawa*, the record neither indicates the occurrence of any uncharacteristic business expenditures or losses, nor documents an outstanding reputation by the Petitioner in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service.

Also unlike in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay multiple beneficiaries. Thus, assessing the totality of the circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage based on the magnitude of its business operations.

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision on this ground and dismiss the appeal.

II. THE BENEFICIARY'S QUALIFYING EXPERIENCE

As previously indicated, a petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Wing's Tea House,* 16 I&N Dec. at 159; *Katigbak,* 14 I&N Dec. at 49.

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states the minimum requirements of the offered position of technical lead as a Bachelor's degree or a foreign equivalent degree in computer science, engineering, computer information systems, management information systems, or a related field, plus 60 months of experience in the job offered or in a similar position. Part H.14 of ETA Form 9089 also requires experience using "AIX/C/C++/C#/.Net/VB/J2ee/JMS/Oracle/DB2/MQ/Solaris/ Ab Initio/Mainframe."

The Beneficiary attested on the labor certification to about 115 months of relevant, full-time experience, including employment by the Petitioner. The Beneficiary stated the following experience:

- About six months as a programmer analyst with the Petitioner in the United States from April 2, 2013, until the petition's priority date of September 26, 2013;
- About 40 months as a computer programmer with the Petitioner in the United States from January 26, 2009, to May 31, 2012;
- About nine months as a systems analyst with [redacted] in the United States from April

23, 2008, to January 25, 2009;
- About seven months as a systems analyst with [redacted] in the United States from September 5, 2007, to April 22, 2008;
- About six months as a systems analyst with [redacted] in the United States from March 12, 2007, to September 4, 2007;
- About ten months as a systems analyst with [redacted] in the United States from May 10, 2006, to March 7, 2007;
- About one month as a systems analyst with [redacted] in the United States from April 4, 2005, to April 28, 2005;
- About 12 months as a senior software engineer with [redacted] in India from April 9, 2001, to April 6, 2002; and
- About 24 months as a senior software consultant for [redacted] in India from April 8, 2001, to March 25, 2003.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must provide the names, addresses, and titles of the employers, and describe the beneficiary's experiences. *Id.* The instant record contains documents supporting the Beneficiary's claimed qualifying experience with the Petitioner, [redacted]

A. The Beneficiary's Qualifying Experience with the Petitioner

A labor certification employer cannot count a beneficiary's experience with it, unless it demonstrates the infeasibility of training other workers to qualify for the offered position, or the beneficiary's acquisition of the experience in positions that were not "substantially comparable" to the offered position. 20 C.F.R. § 656.17(i)(3). A "substantially comparable" position means a job requiring performance of the same duties more than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

The instant record indicates the Beneficiary's experience with the Petitioner in jobs that required performance of the same duties less than 50 percent of the time. The Petitioner may therefore count the experience that the Beneficiary gained with it.

The Petitioner submitted a May 28, 2014, letter from its chief executive officer (CEO), indicating its full-time employment of the Beneficiary as a programmer analyst since April 2, 2013 and as a computer programmer from January 2009 to May 2012. The letter also describes the Beneficiary's experience. The record therefore establishes the Beneficiary's possession of about 46 months of qualifying experience with the Petitioner.

The Director found that the Beneficiary gained four years, two months, and seven days, or about 50 months, of qualifying experience with the Petitioner. However, both the labor certification and the Petitioner's letter state the Beneficiary's employment from January 2009 to May 2012 (about 40 months) and from April 2, 2013, to September 26, 2013 (about six months). The record does not indicate the Beneficiary's employment from May 2012 to April 2, 2013. The record therefore

establishes the Beneficiary's possession of only about 46 months of qualifying experience with the Petitioner.

B. The Beneficiary's Qualifying Experience with

The Petitioner submitted an April 22, 2008, letter on stationery. The letter states the Beneficiary's employment by from September 5, 2007, to April 22, 2008, most recently as a consultant specialist. However, as indicated in the Director's RFE, the letter does not indicate the employer's title or describe the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1). The letter also does not indicate the employer's address.

In response to the RFE, the Petitioner submitted a January 21, 2015, affidavit from a purported former senior principal consultant/manager of The affidavit states the Beneficiary's full-time employment by from September 5, 2007, to April 22, 2008 as a consultant specialist and describes his duties.

As indicated in the Director's decision, the Petitioner did not demonstrate the unavailability of a letter from as required by 8 C.F.R. § 204.5(g)(1). A petitioner must demonstrate the unavailability of required evidence before USCIS can consider other evidence. 8 C.F.R. § 103.2(b)(2)(i). Also, the affidavit indicates the signatory's employment by while the Beneficiary claims qualifying experience with The record does not explain whether the affiant worked for the same company as the Beneficiary during the relevant period.

On appeal, the Petitioner submits a July 10, 2015, affidavit by the Beneficiary, stating the acquisition of by the in August 2008, which resulted in the layoffs of him and his department.[9] The Beneficiary states that the signatory of the January 21, 2015, affidavit was "my manager's manager" at He states that the affiant "was the closest manager that I was able to locate who could attest to my schedule and duties." The record also contains copies of news articles regarding acquisition of in August 2008 and the resulting layoffs of about 25,000 former employees.

Under these circumstances, the record establishes the unavailability of a required letter from The record also establishes the Beneficiary's possession of about seven months of qualifying experience at

C. The Beneficiary's Qualifying Experience with

The Petitioner submitted a December 4, 2006, letter from an immigration specialist on stationery. The letter states the Beneficiary's employment by as a computer systems analyst

[9] The affidavit states its notarization on July 11, *2014*. However, the date appears to be a typographical error. The contents of the affidavit indicate its likely notarization on July 11, *2015*.

(senior consultant) since May 1, 2006, and describes his duties. The record therefore establishes the Beneficiary's possession of about seven months of qualifying experience with

D. The Beneficiary's Qualifying Experience with

The record contains an April 15, 2002, certificate from an assistant manager on the stationery of The certificate states the Beneficiary's employment by as a senior software engineer from April 9, 2001, to April 15, 2002.

However, as indicated in the Director's RFE, the certificate does not describe the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1). In addition, the accompanying labor certification states the Beneficiary's full-time employment by from April 8, 2001 to March 25, 2003, the same period during which he purportedly worked full-time for The record does not explain how the Beneficiary worked full-time for two employers at the same time. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

In response to the RFE, the Petitioner submitted a January 22, 2015, letter from a human resource manager on The letter states the Beneficiary's full-time employment by as a senior software engineer from April 9, 2001, to April 15, 2002. However, as indicated in the Director's decision, the letter is on stationery, but the Beneficiary claims to have worked for The record does not explain whether the letter is from the same employer claimed by the Beneficiary. Also, the duties in the letter are printed in darker type than its other contents. The duties appear to have been cut and pasted into the letter from another document. *See Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence of record).

On appeal, the Petitioner submits a July 10, 2015, letter on stationery from the same human resource manager. The letter is identical to the prior letter, except it states that was formerly known as The record also contains news articles and financial filings indicating establishment as a joint venture of a subsidiary. The record indicates Pacific's purchase of interest in the company in 2002 and a change in the company's trade name to

The record on appeal explains the change in the company name from However, the record does not explain the irregular type in the January 22, 2015, letter or the inconsistency of the Beneficiary's claimed full-time employment by two companies at the same time on the labor certification. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

Despite the unresolved discrepancies regarding the Beneficiary's claimed employment by the record appears to establish his possession of 60 months of qualifying experience, including: 46 months with the Petitioner; seven months with and seven months with However, as

previously indicated, Part H.14 of ETA Form 9089 requires experience using "AIX/C/C++/C#/ .Net/VB/J2ee/JMS/Oracle/DB2/MQ/Solaris/AbInitio/Mainframe." The supporting documentation does not indicate the Beneficiary's use of any of the required technologies in gaining his qualifying experience with the Petitioner,

Thus, the record does not establish the Beneficiary's qualifying experience for the offered position by the petition's priority date as specified by the accompanying labor certification. We will therefore affirm the Director's decision and dismiss the appeal on this additional ground.

III. THE PETITIONER'S ALLEGED MISREPRESENTATION

A finding of fraud or willful misrepresentation of a material fact in visa petition proceedings is significant because USCIS may invalidate a labor certification after its issuance upon such a finding "involving the labor certification." 20 C.F.R. § 656.30(d). A finding of fraud or willful misrepresentation of a material fact must be supported by substantial evidence. *Sugule v. Frazer*, 639 F.3d 406, 411 (8th Cir. 2011).

Fraud "consist[s] of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party." *Ortiz-Bouchet v. U.S. Att'y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013) (quoting *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956)). "The representation must also be believed and acted upon by the party deceived to his disadvantage." *Id.*

A willful misrepresentation of a material fact includes the same elements as fraud, except that a willful misrepresentation does not require an intent to deceive or proof of a successful deception. *Id.* at 1356-57 (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 290 (BIA 1975)).

In the instant case, the Director noted the Petitioner's attestation on the Form I-140 to the truth and accuracy of its petition and supporting documentation. The Director then denied the petition "with a finding of fraud or willful misrepresentation of a material fact."

However, as the Petitioner argues, the Director's decision does not specify any material facts misrepresented by the Petitioner, either "involving the labor certification" or otherwise. *See* 8 C.F.R. § 103.3(a)(1)(i) (requiring an officer to "explain in writing the specific reasons for denial").

As previously discussed, the record contains unresolved discrepancies regarding the Beneficiary's claimed qualifying experience for the offered position, including the submission of a letter from a purported former employer that appears to have been altered. However, the record does not contain substantial evidence of the Petitioner's fraudulent or willful misrepresentation of the Beneficiary's qualifying experience.

The record lacks substantial evidence of the Petitioner's engagement in fraud or willful misrepresentation of a material fact. We will therefore withdraw that portion of the Director's decision.

IV. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage or the Beneficiary's qualifying experience for the offered position. We will therefore affirm the Director's decision and dismiss the appeal. The record does not support the Director's finding that the Petitioner engaged in fraud or willful misrepresentation of a material fact. We will therefore withdraw that portion of the Director's decision.

The petition will be denied for the foregoing reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-G- Inc.*, ID# 15109 (AAO Feb. 9, 2016)